In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 90

MARTIN E. WOLIN, INDIVIDUALLY, MARTIN E. WOLIN, LTD., AND CHAL STEEL CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 147–151) is reported at 211 F. 2d 770.

JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 1954 (R. 152), and a petition for rehearing (R. 152–R. 156) was denied on April 24, 1954 (R. 157). The petition for a writ of certiorari was filed on May 24, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether, at a trial involving charges of bribery of a government employee, the testimony of the employee's wife, to whom the checks were made payable, that she paid little attention to the details of the arrangement with her husband was so inconsistent with her plea of guilty as to render the use of her testimony willful misconduct by the prosecution.

2. Whether the prosecuting attorney, in his argument to the jury, misstated the evidence given by a principal government witness in such manner as to require a new trial.

STATUTES INVOLVED

18 U. S. C. (Supp. V) 201 provides as follows:

> Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which

> may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both.

18 U. S. C. (Supp. V) 281 provides, in relevant parts, as follows:

> Whoever, being * * * or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court marshal, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

18 U. S. C. (Supp. V) 371 provides, in relevant part, as follows:

Petitioner talked generally about applications for licenses and suggested to Bennett that it would be legal for him to sell steel while continuing his government position. He said that the matter could be handled by putting Mrs. Bennett on the payroll and making payments to her. (R. 25–28.)

Shortly thereafter, Bennett told a Mr. Pardeo, who wished to purchase tin plate, of the type of material that petitioner had and said that "if he could use some of that material I felt that we could give him a license. Since he was buying for all Venezuelan trades, that is." (R. 29.) Thereafter, when petitioner called about some of his applications, he told Bennett that Pardeo had been to see him and that he was sending an application through (R. 29). Petitioner again took Bennett and his wife to dinner and gave Bennett $500.00 in cash (R. 30). Arrangements were made to send the license applications to Bennett's home in order to make it appear that Mrs. Bennett was doing the work. (R. 32–33.) Bennett testified that petitioner "knew that if Mr. Pardeo purchased material from him that I would grant a license" (R. 31).

In September 1951, petitioner arranged for the purchase of a car in Henry Bennett's name, partly with Bennett's money and partly with money advanced by petitioner, which was said to be a commission on sales to Pardeo (R. 33–40). Petitioner drew a check in the sum of $1,972 to the order of Mrs. Bennett to have a

record of payments, including the money paid to Bennett in cash (R. 38, 73). Petitioner explained the amount by stating that he credited an order that was to be processed after he left for Europe and said that a subsequent check for $226 to Mrs. Bennett was a mistake (Tr. 1218–1220, see R. 105–107).

When petitioner left for Europe in October 1951, he told the Bennetts that Mrs. Halperin would handle licenses and commissions (R. 44). Subsequently Bennett promised Mrs. Halperin that 15 applications for licenses for sales in Italy and Portugal to be filed by the Chal Steel Corporation, one of the corporate defendants in this case, would be in order (R. 46, 50). Bennett approved them all but seven were not recorded by him in accordance with the normal routine of the Office of International Trade (R. 51).

During the third and fourth quarters of 1951, when substantially all of the petitioner's license applications were approved, other exporters' applications for sending secondary tin plate to Italy were being returned without approval at the rate of 8 returned for every one approved (Tr. 807–808; see also Tr. 1112). Indeed, Bennett himself told one complaining exporter in November 1951, that tin plate licenses were not being issued (Tr. 1102).

The testimony of Mrs. Bennett (R. 85–102), on the basis of which petitioner frames one of his present contentions, was to the effect that she

accompanied her husband on the occasions on which he and petitioner worked out their plans for the payment of commissions (R. 89), the sending of applications to the Bennett home (R. 88), and the placing of Mrs. Bennett on petitioner's payroll (R. 87, 89, 91). She testified that she was aware of these arrangements although she did not pay too much attention to the conversations (R. 87, 88), and that she was present during most of the negotiations for the purchase by the Bennetts, through petitioner, of an automobile (R. 92–93). She testified also that she was not responsible in any way for referring Pardeo to petitioner (R. 97–98), and that the so-called commission checks issued in her name, some of which she had deposited in the bank, were for her husband (R. 96–97).

After the presentation of evidence on both sides was complete, the prosecuting attorney stated, in the early part of his summation to the jury:

> My job is to put before you as best I can all the admissible evidence that can give you an adequate picture of what happened and that is what I will try to do. * * * Now during the argument it is my job to try to point out to you conclusions, inferences that you can draw from these facts, and that is what I intend to do. I have to rely on my memory in recalling the evidence. I don't have a transcript of the record. Unfortunately I understand that Judge Arnold and Mr. Boothe [defense

> counsel] have certain parts of it. If in recalling evidence to you, ladies and gentlemen, and believe me, I mean this, I don't agree with your recollection of what happened, take your own. I am not trying to mislead you. My memory may be bad. I am trying to remember the evidence as I recall it. So if I say something and you don't remember it that way, take your own on it, but believe me, I am not doing it intentionally. [Tr. 1361.]

In addition, the prosecuting attorney referred to the fact that Mrs. Bennett had pleaded guilty, and to the fact that she was unsentenced, and suggested that the fact that she would later have to appear before the same judge for sentencing was an incentive for her to testify truthfully (Tr. 1407).

Defense counsel then made their summation to the jury, which was not reported (R. 103), following which the Government made rebuttal argument. This argument contained the statement which is made one of the bases for review by this Court. It is italicized in context:

> Some of the remarks made by Mr. Arnold and Mr. Boothe, I think principally by Mr. Arnold, went to the effect that there is nothing wrong about entertainment. The mink coat era is fine. It is all right to take Government employees out and show them a good time. If it is done for one purpose.

Sure. If it is done for another purpose, no. You folks read the newspapers. You have seen stories in the newspapers. Let me put it to you this way: For every Government employee who has done wrong by taking money, gifts and stuff like that for doing something in the government, he doesn't do it on his own money, doesn't come out of the thin air and say, hello, Mr. Bennett, here I am. You have to have a Wolin in the background and in the foreground. You can't have a dishonest Government employee unless you've got someone giving him the money. It is impossible. And the only way that the Government service can be straightened around is not only to get the Government employees who do something wrong but to get the people that give it to them because it takes two to make that kind of a party. Believe me. Money doesn't grow on trees. It is given for a purpose. So that you have this instance here in front of you. *You have had Mr. Bennett on the stand who has told you ladies and gentlemen in so many words in plain and simple English, "I took money. I took money in checks." Why? Because I am a licensing officer. Bennett has told you in plain and simple English, "I am guilty." Why would he tell you that? Because he is.*

Now who created the situation. Who gave the wherewithal, who gave the money, who gave the push? The man who is on trial here today. You don't clean up the

> Government, you don't get the Government employees by going after them alone. You have to get the source of it, too. So when the argument is made to you ladies and gentlemen that entertainment is fine, that the mink coats and everything is all right, I say to you again, and your responsible citizens, come from your walks of life, spend here a couple of weeks—you spent all of last week in this case—to clean up a situation like that, there are two ways. If you go about both of them you clean it up. One, you get the Government employee who isn't living up to his trust and, No. 2, you get the party on the outside of the Government who doesn't think enough of the United States Government to stay away from its employees with money and checks. [R. 103–104; italics added.]

At the close of this rebuttal, defense counsel objected to the italicized portion of the statement, urging that the "statement is so serious and is such a complete departure from the record that * * * we ought to be allowed at this point to make a statement to the jury that it is not so because the jury will not have the record with them [and] * * * will have to rely on memory and counsel's complete misstatement * * *" (R. 119–120).

The trial judge said that he thought that the proper way to handle the matter was to instruct the jury that it was their recollection rather than counsel's statement which counted, and at the

very opening of his charge, he did so (R. 120), stating, *inter alia:*

> You rely upon your own recollection and if the Court says anything * * * in respect to the evidence that is contrary to your recollection, you will follow your own recollection and judgment and the same is true with reference to what counsel may have said to you in their recollections of what this witness or that witness said is not conclusive upon you at all. * * *[2]

After the jury had retired and had been out approximately five hours, they returned to request a transcript of the evidence. They indicated that they wanted all the available testimony, but were particularly interested in the testimony of the petitioner (R. 134–135). Although all of the testimony had not been transcribed, what they were given included the testimony of petitioner and that of Bennett (R. 135). Later, after the jury had indicated its inability to reach a verdict, and after the court had given the so-called "Allen charge," a verdict of guilty was reached (R. 143).

The petitioner, Martin E. Wolin, individually, was sentenced to 18 months' imprisonment, and the two corporate defendants, to pay $1,000 fines

[2] Also, later in the charge, after reviewing the facts that had been presented, and the issues which were open to the jury, the court said again:

"* * * It does not mean to tell you that in its opinion any of these facts exist except those that I have enumerated as being uncontradicted. * * * It is for you to determine whether or not those facts do exist in this case." [R. 130.]

(R. 143–144). The judgment was unanimously affirmed by the Court of Appeals (R. 152).

ARGUMENT

1. Petitioner argues that Mrs. Bennett's testimony was so clearly inconsistent with her plea of guilty that the prosecutor's use of such testimony represents knowing misconduct. The contention is patently frivolous.

Mrs. Bennett's testimony was not inconsistent with her plea of guilty. The fact that, as her testimony suggests, she did not pay detailed attention to the arrangements between petitioner and her husband (see Pet. p. 12) does not mean that she claimed to be aware of so little of the transaction as not to be criminally liable for her participation therein. She admitted that she knew that she was participating in an arrangement whereby she would be put on petitioner's payroll (R. 87), that petitioner was to send license applications to her for remailing to the Department of Commerce (R. 88, 89), and that she was to be paid at the rate of $5 per ton (R. 89). She testified further that her husband had told petitioner he did not think the arrangement would be legal, although petitioner assured him that it would be (R. 89; see also R. 91). She testified that petitioner's applications were received by mail at her home, and that she either mailed them to the Office of International Trade herself or her husband took them personally

(R. 90; see also R. 95). She testified that she received checks from petitioner, purportedly for commissions, even though she had done nothing to earn them (R. 96–97), and she testified that petitioner had given her a diamond and ruby pin (R. 98). Her testimony was thus not a declaration of innocence.

Moreover, Mrs. Bennett's allegedly ambiguous status was apparent to the jury. She explicitly testified that she had pleaded guilty and was unsentenced (R. 102) and the Government referred to these facts in its summation (Tr. 1407). The jury, therefore, was able fully to appraise her worth as a witness in accordance with the full instructions to the jury by the court on that point (see R. 132).

2. Petitioner also argues that this Court should grant his petition in order to censure the prosecutor for having made what petitioner says are misstatements of crucial evidence during his rebuttal summation to the jury (Pet. 14–17).

The first objection to review of this point by this Court is procedural. No report was made of the summation for the defense, to which the language complained of is, at least apparently, a response. A reviewing court cannot, therefore, appraise, out of the context necessary to understand it, a remark of a government attorney made in course of such rebuttal. See e. g., *Landay* v. *United States,* 108 F. 2d 698, 706

(C. A. 6), certiorari denied, 309 U. S. 681; *Vause* v. *United States,* 53 F. 2d 346, 354 (C. A. 2), certiorari denied, 284 U. S. 661.

In any event, there was no misstatement, but at most a restatement or interpretation of the witness's testimony. Bennett's testimony was clear to the effect that petitioner constantly talked with him about approval of license applications; that petitioner expected Bennett to approve licenses for shipments to Pardeo (R. 31). Bennett recognized that his conduct, objectively viewed, showed favoritism toward petitioner (R. 84). Bennett unqualifiedly stated that he, rather than Mrs. Bennett as petitioner had testified, took the money. In the light of all the evidence it was not unfair to say that Bennett testified that he took it because he was a licensing officer and, in effect, that he was guilty.

The statement was not part of a complete review of the evidence, as petitioner suggests, but was principally a way of making clear that no government employee can be involved in a bribe without there being someone out of government who is also blameworthy. For the purpose of setting in context petitioner's guilt as instigator, Bennett's plea to the offense was stated, in perhaps overly simplified terms, but certainly not in essential falsehood. In short, examination of the second and third paragraphs of the rebuttal argument (R. 103–104), rather than merely the short excerpt to which petitioner refers, discloses that

petitioner's request for review on this phase of the case is based on a misleading abbreviation of the record.

Moreover, the trial judge, in response to petitioner's objections, emphasized to the jury at the very outset of its charge, that the jury's own recollection of the facts was governing (R. 120), and later explicitly reiterated the charge (R. 130). The importance of Bennett's part in the transaction has been stressed from the very beginning of the case by petitioner's own counsel who said in his opening statement (Tr. 588):

> We have here a sixty page indictment in thirteen counts, presented against this man, and yet from that mass of papers, there is only one question involved and that is, Did Wolin pay any compensation to Twila Bennett to get him business or did he pay compensation to Bennett to have him issue licenses? [See also Tr. 593–594.]

In the face of the centrality of this issue from the beginning to the end of the case, the jury must have paid particular attention to the testimony bearing upon it so that they could not have been misled by the one statement upon which petitioner relies. This is all the more true in view of the fact that during the jury's deliberations, the record was requested (R. 134). Although it was requested for the purpose, particularly, of looking at petitioner's testimony and

although all of the record was not furnished, the Bennett testimony was (R. 135–136), so that, as to this issue, the jury did not have to rely in any way on the prosecutor's recollection.[3]

[3] In his petition for certiorari, petitioner makes much of what he called an additional misrepresentation made by the prosecution in the Court of Appeals. He refers to the government's brief in the Court of Appeals and the opinion of the Court, apparently in reliance on it, that the Government rebuttal in the trial court was "apparently an attempt to give the jury the Government's idea of the total effect of Bennett's testimony and the inferences to be drawn therefrom, *and thus to answer the argument of counsel for defendants that there was no proof of a guilty principal whom defendants could have aided and abetted.*" [Emphasis added, see Pet. 15.] Petitioner says no such argument was made, and attempts to demonstrate that no such argument could have been made.

We have suggested above that this Court's certiorari jurisdiction is not a device to resolve arguments about what happened in the trial court, particularly where defense counsel apparently elected to keep the real events unrecorded. We also suggest that, contrary to petitioner's argument here that he could not have made an aider and abetter argument in the trial court because in all the substantive counts petitioner was indicted as a principal (Pet. 9), there were in fact aider and abetter charges in the case against petitioner (see counts 1 to 4, Tr. 1–9). Although sustaining the conviction does not depend on those counts, it is clear that the trial judge talked about those counts in his charge to the jury (R. 123–125), and it seems at least plausible that petitioner's counsel might have talked about them.

The record reveals, moreover, a further curious fact on this aspect of the case. The very "misrepresentation" which petitioner says the Court of Appeals accepted was also made in the District Court. After verdict and judgment, the petitioner made a motion for a new trial in which he relied, in part, on the alleged misstatements as to Bennett's testimony (Tr. 485–500). The Government explained the statement almost word for word as it did in the Court of Appeals, in a

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

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JULY 1954.

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memorandum filed and argued before the very judge who had just tried the case (Tr. 506–543, especially 513–515). Petitioner thereafter, and before the motion was ruled on, filed a supplementary memorandum on other points which were involved in this motion, but did not challenge the truth or the logic of the prosecution representation (Tr. 544–550).

Later, in the Court of Appeals, the matter was challenged only by a petition for rehearing in which petitioner conceded that he had been remiss in not calling the court's attention before argument to the alleged misrepresentation in the Government's brief (R. 155).

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